

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ADRIAN SALAS VARGAS

Claimant

VS.

ASSOCIATED WHOLESALE GROCERS, INC.

Self-Insured Respondent

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Docket No. 1,045,434

ORDER

Claimant and respondent appeal the April 11, 2011, Award of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was awarded a 4 percent functional impairment at the level of the right hand after the ALJ found that claimant had proven that he suffered personal injury by accident which arose out of and in the course of his employment with respondent. Claimant was awarded temporary total disability compensation (TTD) from June 10, 2009, to November 11, 2009, for a date of accident on April 6, 2009, the date claimant's authorized physician restricted claimant's work duties. The Appeals Board (Board) heard oral argument on July 20, 2011. Gary R. Terrill, of Overland Park, Kansas, was appointed as a Board Member Pro Tem in this matter.

Claimant appeared by his attorney, Michael H. Stang of Mission, Kansas. Respondent and its insurance carrier appeared by their attorney, Frederick J. Greenbaum of Kansas City, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The parties stipulated at regular hearing that claimant had been paid TTD in the total amount of \$13,650.00 for the period from November 9, 2009, through May 9, 2010, a period of 25 weeks, at the weekly rate of \$546.00. It was pointed out at the oral argument to the Board that the period from November 9, 2009, through May 9, 2010, is actually 26 weeks. Additionally, the parties stipulated that the \$510.00 weekly compensation rate awarded by the ALJ was incorrect for the date of accident determined in this matter. The parties agreed that for a date of accident on April 6, 2009, the appropriate weekly compensation rate should be \$529.00. The parties further agreed that claimant's injury was to the forearm and not to the hand.

ISSUES

1. What is the nature and extent of claimant's injuries and disability? Claimant argues that he suffered a 20 percent functional disability to the right upper extremity at the level of the wrist (forearm) pursuant to the medical opinion of board certified occupational and preventative medicine specialist Michael J. Poppa, D.O. Respondent contends that the medical opinion of board certified orthopedic surgeon Michael M. Hall, M.D., that claimant suffered a 4 percent functional disability to the right upper extremity at the level of the wrist, is proper. The ALJ found the 4 percent rating of Dr. Hall to be the most credible, but assessed the award at the level of the hand.¹
2. Is claimant entitled to TTD either for the period from November 9, 2009, through May 9, 2010, or for the period from June 10, 2009, through November 11, 2009? Claimant had been returned to work at his regular job but left work on his own on June 9, 2009, because his hand hurt. Respondent further argues that this record fails to support an award of TTD for any weeks, based on the testimony of Dr. Hall. Therefore, the issue is how much, if any, TTD is claimant entitled to for these injuries?
3. What is the proper compensation rate for this date of accident? The parties stipulated that, for a date of accident on April 6, 2009, the compensation rate in this matter would be \$529.00 per week. As the parties have stipulated to this weekly rate for this date of accident, and as date of accident was not raised as an issue to the Board on appeal, this weekly benefit rate will be utilized in this matter when the appropriate disability determination has been reached.

FINDINGS OF FACT

Claimant began working for respondent in its grocery warehouse in September 2001. Claimant's job involved order selection, where he would fill orders. This required that he pull and lift boxes weighing 50 to 100 pounds on a regular basis, working 50 to 60 hours per week. Claimant began having problems in 2007 with his right hand. Claimant initially received treatment at Concentra Medical Center (Concentra) on August 6, 2007, involving pain medication. On August 8, 2007, claimant was released to return to regular duty. The medical report of that date indicated that claimant had improved and was not experiencing pain. Additionally, the report stated that the swelling in claimant's right hand was gone. After returning to work, claimant's right hand condition worsened. Claimant began experiencing pain and swelling in his hand.

¹ K.S.A. 44-510d(a)(11).

Claimant sought medical treatment from his family physician, Dr. Paula Vogt, on January 19, 2009. Claimant reported the problem to respondent and was referred back to Concentra, where he was examined and returned to work with light-duty restrictions on April 7, 2009. An MRI of the right wrist was accomplished on April 22, 2009. On April 24, 2009, claimant was released to his regular job without restrictions after the Concentra doctor determined that claimant's condition was not work related.

Claimant was referred by his attorney to Dr. Poppa on May 8, 2009. Dr. Poppa determined that claimant was not at maximum medical improvement and recommended additional treatment. However, Dr. Poppa opined that claimant was capable of performing his regular job with respondent at that time. Dr. Poppa further recommended that claimant be seen by a hand surgeon. Claimant continued to work for respondent, performing his regular job until June 9, 2009, at which time he left work voluntarily. Claimant testified that he left work due to right hand pain. Claimant returned to Dr. Vogt on July 24, 2009. At that time, she gave claimant light-duty restrictions of no lifting greater than 10 pounds. Claimant was not provided with accommodated light-duty work by respondent.

Claimant was ultimately referred by respondent to Dr. Hall on September 14, 2009. Dr. Hall diagnosed claimant with carpometacarpal (CMC) boss associated with tendinitis of the second and third CMC joints.² The bone in claimant's wrist was at the location of the two tendons that pull his wrist back. Claimant apparently had an extra bone at the tendon site. Conservative treatment proved less than satisfactory, and surgery was discussed and ultimately pursued. The surgery involved the removal of the boss from the tendon site in order to eliminate the irritation caused by the tendons crossing the extra bone. Dr. Hall performed the surgery on January 14, 2010. He testified that this type of surgery resulted in a lengthy healing period. The surgery result was good but not great. The improvement was at about 50 to 75 percent, with one of the areas of pain going away completely. Claimant was ultimately released at MMI on May 4, 2010. Dr. Hall rated claimant at 4 percent to the right wrist based on the fourth edition of the *AMA Guides*.³

Claimant was referred by his attorney to Dr. Poppa for a second time on June 29, 2010. He determined that claimant had developed a CMC boss on the third metacarpal of his right hand. The cause of the condition was claimant's work with respondent. Dr. Poppa rated claimant at 20 percent of the right upper extremity at the level of the wrist. His rating was based on the fourth edition of the *AMA Guides*.⁴ The impairment was determined by testing claimant's right hand grip strength. He acknowledged that the fourth edition of the *AMA Guides* do not give grip strength a

² CMC is the carpometacarpal joint at the base of the metacarpal. A boss is a rounded eminence on the surface of a bone.

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

⁴ *AMA Guides* (4th ed.).

large role in determining impairments, as the factors are subjective and difficult to control. However, when Dr. Poppa tested claimant's grip strength, claimant displayed a proper bell curve, indicating that maximum effort was being expended. Dr. Poppa was questioned regarding claimant's ability to work and his physical condition between the May 8, 2009, examination and the June 29, 2010, examination. He acknowledged that he was not in a position to give any opinion regarding claimant's work status during that period of time.

Dr. Hall was asked if the surgery performed on claimant would affect grip strength. He stated that the location of the surgery would not normally affect grip strength, with the only exception being pain. He stated that no force would be produced with the involved tendons. Dr. Hall does not use grip strength as a test for determining impairment under the fourth edition of the *AMA Guides*. He testified that grip strength is too subjective. Dr. Hall also testified that, in his opinion, claimant was never temporarily totally disabled from his job with respondent. He usually sends workers back to one-handed duty within three days of the surgery. He placed permanent restrictions on claimant of continuous lifting up to 10 pounds and frequent lifting of up to 20 pounds.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁵

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁶

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁷

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule,

⁵ K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

⁶ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁷ K.S.A. 2008 Supp. 44-501(a).

66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

- ...
- (11) For the loss of a hand, 150 weeks.
 - (12) For the loss of a forearm, 200 weeks.⁸

An injury at the joint on a scheduled member shall be considered a loss of the next higher schedule.⁹

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.¹⁰

Both Dr. Hall and Dr. Poppa determined that claimant's functional impairment involved the right hand and wrist. The Award limits claimant's functional impairment to the hand. Based upon this record and per the agreement of the parties, the Award will be modified to the level of the right forearm.

The ALJ determined that the functional impairment opinion of Dr. Hall, the treating physician, was the most credible in this record. The Board agrees. The impairment opinion of Dr. Poppa was based upon claimant's limited grip strength. Dr. Hall testified that, not only does the fourth edition of the *AMA Guides* prefer the loss of range of motion, the tendons affected by this surgery should not impact claimant's grip strength. The Board finds the 4 percent functional impairment of Dr. Hall is the most credible in this record and affirms the award of a 4 percent functional impairment. But, the Award is modified to reflect the level of impairment at the forearm, and will be paid at the agreed weekly rate of \$529.00.

(2) Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any

⁸ K.S.A. 44-510d(a)(11)(12).

⁹ K.A.R. 51-7-8(c)(4).

¹⁰ K.S.A. 44-510e(a).

type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.¹¹

Claimant has requested TTD from June 10, 2009, to November 9, 2009. However, when claimant was examined by Dr. Poppa on May 8, 2009, he found claimant capable of performing his job with respondent. Dr. Poppa was questioned regarding claimant's ability to work and his physical condition between the May 8, 2009, examination and the June 29, 2010, examination. He acknowledged that he was not in a position to give any opinion regarding claimant's work status during that period of time. At the time claimant left his job on June 9, 2009, he was under no restrictions from any healthcare provider. When claimant was examined by Dr. Hall on September 10, 2009, he was not found to be temporarily and totally disabled. Dr. Hall testified that the only time claimant was temporarily and totally disabled was for a period of three days after the surgery on his right hand/wrist.

(1) Where temporary total disability results from the injury, no compensation shall be paid during the first week of disability, except that provided in K.S.A. 44-510h and 44-510i and amendments thereto, unless the temporary total disability exists for three consecutive weeks, in which case compensation shall be paid for the first week of such disability. Thereafter weekly payments shall be made during such temporary total disability, in a sum equal to 66 2/3% of the average gross weekly wage of the injured employee, computed as provided in K.S.A. 44-511 and amendments thereto, but in no case less than \$25 per week nor more than the dollar amount nearest to 75% of the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto, per week.¹²

As claimant was not totally disabled for three consecutive weeks, he would not be entitled to TTD as the result of this injury. It is claimant's burden to prove his entitlement to benefits under the Workers Compensation Act. Here, claimant has failed to prove entitlement to TTD at any time, except for the three days following the surgery. As noted above, without three consecutive weeks of TTD, a claimant will not be paid benefits during the first week of disability. As such, claimant cannot be awarded TTD for the three days. Any award of TTD in this matter must be denied. The award of the ALJ on this issue is reversed.

¹¹ K.S.A. 44-510c(b)(2).

¹² K.S.A. 44-510c(b)(1).

If compensation, including medical benefits, temporary total disability benefits or vocational rehabilitation benefits, has been paid to the worker by the employer or the employer's insurance carrier during the pendency of review under this section and the amount of compensation awarded by the board is reduced or totally disallowed by the decision on the appeal or review, the employer and the employer's insurance carrier, except as otherwise provided in this section, shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a and amendments thereto for all amounts of compensation so paid which are in excess of the amount of compensation that the worker is entitled to as determined by the final decision on review. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection (d)(1), and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith.¹³

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to reflect the correct weekly benefit rate of \$529.00, and modified to award claimant a 4 percent functional disability at the level of the forearm, but reversed with regard to the award of TTD.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated April 11, 2011, should be, and is hereby, modified to award claimant weekly benefits at the correct weekly rate of \$529.00 and modified to award claimant a 4 percent functional disability at the level of the right forearm. The Award is reversed with regard to the award of TTD. In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Adrian Salas Vargas, and against the respondent, Associated Wholesale Grocers, Inc., for an accidental injury which occurred on April 6, 2009, and based upon an average weekly wage of \$1,060.90.

¹³ K.S.A. 2008 Supp. 44-556(d)(1).

Claimant is entitled to 8 weeks at the rate of \$529.00 per week or \$4,232.00 for a 4 percent permanent partial functional disability at the level of the right forearm, making a total award of \$4,232.00.

As of the date of this award, the entire award is due and owing and ordered paid in one lump sum minus any amounts previously paid. Any overpayment by respondent must be submitted to the Director of Workers Compensation pursuant to K.S.A. 44-556(d)(1).

The record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant for approval.¹⁴

IT IS SO ORDERED.

Dated this ____ day of August, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant
Frederick L. Greenbaum, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge

¹⁴ K.S.A. 44-536(b).